No. 1048.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FRANK McGOWAN,
BERT SCHLESINGER,
Attorneys for Plaintiff in Error.

Pernau Press.

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STATEMENT OF THE CASE.

This is an appeal from a judgment of conviction rendered in the District Court of the Northern District of California on the 6th of February, 1904. The only question involved is as to the sufficiency of the indictment. The plaintiff in error moved for a new trial and in arrest of judgment, both of which motions were denied.

The indictment charges that on the 31st day of December, 1900, the plaintiff in error devised a scheme to defraud

certain persons mentioned in the indictment, which said scheme to defraud "*was to be effected by opening correspondence and communication with such persons and by distributing advertisements and letters by means of the postoffice establishment of the United States*".

The indictment then sets out a number of representations which it is alleged were false, and that in reliance upon them the persons whose names are mentioned in the indictment were induced to and did give to the plaintiff in error, and his associates, certain sums of money.

It is further alleged that in furtherance of the scheme to defraud a letter was placed in the mails, &c.

POINTS AND AUTHORITIES.

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO CHARGE THAT THE ALLEGED FRAUDULENT SCHEME ORIGINALLY EMBRACED THE DESIGN AND PURPOSE TO USE THE MAILS.

The averment of the indictment, with respect to the postoffice establishment, is as follows:

> "*Which said scheme to defraud* was to be effected by opening correspondence and communication with such persons, and by distributing advertisements, circulars, prospectuses and letters *by means of the postoffice establishment of the United States.*"

The essentials of an indictment of this character are pointed out in Stokes v. United States, 157 U. S. 187:

> "(1.) That the persons charged must have devised a scheme or artifice to defraud; (2) that they must have intended to effect this scheme by opening or in-

> tending to open correspondence with some other person through the postoffice establishment, or by inciting such other person to open communication with them; (3) and that in carrying out such scheme, such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom."

There is no averment in the indictment that the plaintiff in error *intended* to effect the scheme through the postoffice establishment.

In United States v. Harris, 68 Fed. Rep. 347, Judge Ross said:

> "One of the constituent elements of the offense denounced by the statute, upon which the indictment in this case is based, is the intended use of the United States mail in aid or furtherance of the fraudulent scheme. It is therefore essential that the indictment charge directly, and not inferentially or *by way of recital,* that the scheme included the *intended use of the mail."*

In United States v. Long, 68 Fed. Rep. 348, the indictment alleged that the defendant, "having devised a " scheme to defraud one J. W. Strickler, to be effected by " opening correspondence and communication with said " Strickler by means of the postoffice establishment of the " United States," and the Court said:

> "This averment seems to be more in the nature of a recital than a positive allegation, and therefore according to the authorities is at least open to criticism. Assuming, however, without deciding that this defect is one of form and not fatal, the more serious objection remains that the indictment fails to allege that it was *defendant's intention,* as a part of his *fraudulent scheme,* to open correspondence through the mail. * * * The averment, assuming it positive and direct,

that the fraudulent scheme was 'to be effected by opening correspondence by means of the postoffice establishment', is merely a designation of the instrumentality by which the scheme was, in point of fact, to be accomplished, and, unaided by implication or inference, certainly *falls far short* of charging that the defendant, as a part of his *fraudulent scheme, designed its accomplishment through the instrumentality named.''*

And in speaking of the indictment in Stokes v. United States, the learned Judge says:

"In the case of Stokes v. U. S., supra, the indictment, which was held to be sufficient, alleged as follows:

" 'That the postoffice establishment of the United States was to be used for the purpose of executing such scheme and artifice to defraud as aforesaid, pursuant to said conspiracy, &c.'

" This, it will be observed, is an averment, not only that the postoffice establishment was to be used in executing the fraudulent scheme, but, furthermore, that such use was a part of the scheme, or, in the phraseology of the indictment was *'pursuant to said conspiracy'*. The allegation, however, of the indictment in the present case, is *simply that the fraudulent scheme was to be effected by the use of the postal establishment,* without any averment that such *use* was *designed* as a *part* of the *scheme.'* ''

In United States v. Smith, 45 Fed. Rep. 563, it is said:

"But the charge, though couched in the language of the statute, must be made directly, not left to inference, nor stated by way of recital. Herein the pleading is defective. It is not charged directly that the *scheme embraced* the *design* to *use the mails* for its accomplishment, and the statement, as made, is merely by way of recital.''

In United States v. Clark, 121 Fed. Rep. 191, the Court said:

> "To make out an offense, therefore, under the statute, this must be both charged and proved. It is not sufficient that the mails were *actually* used, although that is one ingredient. The scheme must involve their *use* to *effectuate* the fraudulent purpose, the use in fact being merely the overt act. The present indictment is defective in this respect."

In the following cases will be found appropriate averments of this essential of the statute.

In Stewart v. United States, 119 Fed. Rep. 91, the allegation was:

> "By means of the postoffice establishment of the United States which *said use and misuse of the* postoffice establishment of the United States was a *part of said scheme and artifice to defraud.*"

In O'Hara v. United States, 129 Fed. Rep. 553 (C. C. A.) the allegation was:

> "By means of the postoffice establishment of the United States *which said misuse of the postoffice establishment of the United States* was then and there *a part of said scheme and artifice to defraud.*"

The indictment in the case at bar nowhere avers that the defendants' scheme embraced a design to use or misuse the postoffice establishment. It does not appear that the defendants made the postoffice establishment an essential part of their scheme. The scheme is set forth in detail commencing with the words, "That on the 31st day of December, 1900, the said William Baer Ewing and George B. Chaney devised," (see bottom of page 6, tr.) and ending

with the words "correspond with them" (see page 11 tr.) and not a word will be found with respect to the use of the postoffice department. There is absolutely no averment that the use of the postoffice establishment was designed as a part of the scheme.

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO NEGATIVE THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE.

It is an established principle of law that the indictment should negative by specific and distinct averment such material pretenses as the prosecution expects to prove false, so that the defendant may be given notice of what he is to defend against; and these averments of falsity should be as specific and distinct as in an assignment of perjury.

The representations set out in the indictment are that the plaintiff in error and his co-defendant represented to the persons mentioned therein that the Standard Oil Promotion and Investment Company had an authorized capital of $5,000,000 and a subscribed capital of $2,500,000; that it had funds on deposit in the First National Bank, in the Western National Bank and in the Germania Trust Company; that said company was licensed by the United States Government and that the company was organized for the purpose of promoting generally the oil industry of the Pacific Coast; that the said Standard Oil Promotion and Investment Company would finance incorporated oil companies of from $100,000 to $5,000,000 capitalization and put them on a paying basis.

That the said Standard Oil Promotion and Investment Company was transacting and would transact a co-operative investment business in oil stocks and properties, and would give to investors of limited means the same opportunities enjoyed by the "Kings of Finance" and "Market Leaders"; that said investors were receiving and would receive pro rata shares of the profits of said investments every thirty days, as the said profits were or thereafter should be earned; that a complete statement, together with a check for all profits earned, would be sent to all investors at the end of each month; that the only charge that would be made by said Standard Oil Promotion and Investment Company would be twenty per cent of the profits of the said investors on their said investments; that the said defendants should represent that they had made a life-long study of oil throughout the United States; that their judgment based on years of experience would earn thousands of dollars for those who should follow their advice in all matters pertaining to oil; that the said Standard Oil Promotion and Investment Company was investigating and would invest only in first-class stocks and properties; that the said Standard Oil Promotion and Investment Company had been and was represented in every oil producing district of California and Texas; that the money invested by the investors was and would be at times safe; that the said investors could withdraw the entire amount of their investment after ninety days, together with all profits, by giving thirty days notice in writing to the said Standard Oil Promotion and Investment Company.

The indictment further alleges that all of said represen-

tations were made to Charles F. Dosch, Mary Hanson and Annie Guthrie, for the purpose of inducing them to give to the defendants certain property, goods and money.

The allegation of falsity is as follows:

"And said representations * * * and each and all "of them, was and were utterly false and untrue in fact, "and said representations and each and all of them, "was and were well known by the said William Baer "Ewing and George B. Chaney to be utterly false and un- "true in fact, at the time they were so made as aforesaid; "and said representations were made solely for the pur- "pose of obtaining money, goods and property of the said "persons whom they might induce to enter into corre- "spondence with them" (Tr. p. 11).

This is not an allegation that the pretenses were false in fact. It is a mere statement of a conclusion of law.

In State v. Peacock, 31 Missouri, 415, this precise question was presented, and the Court said:

> "It is not sufficient to charge that the defendant falsely pretended, &c. setting forth the means used, and then to aver that by means of such false pretenses he obtained the property, but such of the pretenses as the pleader intends or expects to prove on the trial were used, and were false; he must, as in an assignment of perjury, falsify by specific and distinct averments (3 Chitty, Cr. L. 999; People v. Stone, 9 Wend. 191; 2 M. & S. 279)."

In Commonwealth v. Morrill, 8 Cush. (Mass.) 571, the Court said:

> "The false pretense being correctly set forth and accompanied with all the proper allegations, and the

verdict being a general one, finding the defendant guilty upon the whole indictment, the motion in arrest cannot prevail, if it be found that there is a want of an allegation amounting to a direct negative, as to the value of the watch as represented. The more important representation, one more properly the subject of an indictment, if knowingly and designedly falsely stated, and one upon which a man of ordinary prudence might act, is directly negatived."

In State v. De Lay, 93 Missouri, the Court said:

"The indictment was otherwise faulty in that it failed by special and distinct averment to falsify the pretenses charged."

In State v. Long, 103 Ind. Rep. 484, the Court said:

"Nor was such proof admissible to establish the insolvent or generally bad financial condition of the appellee, since the indictment did not negative the appellee's alleged representations that he was solvent and able to pay all his debts."

This precise question is decided in United States v. Pettus, 84 Fed. Rep. 791. The Court said:

"The opinion of the Court of Appeals in the case of Gabrielsky v. State, 13 Tex. App. 428, very satisfactorily collects the authorities upon this subject, and states that it was well settled in common law, by all the authorities, that it was insufficient to merely negative and declare to be false, the oath of the defendant, *without stating the truth in regard to the fact. It is not sufficient that you shall say that the defendant swore falsely, but you must aver the truth as it appears in the facts, so that its falsity may appear, and he may know wherein the falsity lies.* Says the Court in that case:

'It is a constitutional right of the defendant to be informed by the indictment, in plain and intelligible

words, of the nature of the charge against him, and with that degree of reasonable certainty which will enable him to prepare his defense. He should be told in the indictment wherein, and to what extent, the statements alleged to have been made by him were false that he may know certainly what he is called upon to answer.' ''

The authorities seem to uniformly hold that a general allegation that the representations were false is not sufficient. The indictment should proceed by particular averments to negative that which is false, contradicting in express terms the matter alleged to have been falsely represented. In addition to an averment that the representations were false the indictment should also set forth the truth in regard to the matter at issue. The following is the usual form of averment: "Whereas in truth and in fact (setting out the truth)."

THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO ALLEGE THAT THERE WAS INTENT UPON THE PART OF THE PLAINTIFF IN ERROR TO DEFRAUD ANY ONE.

The indictment does not contain any averment that any of the acts of the defendant were with the intention to injure or defraud the persons whose names are mentioned therein. If the representations of the plaintiff in error, although false in fact, were not made with fraudulent intent, then there is lacking an essential element of the crime here charged, and the conviction should not be allowed to stand. As the intent to injure and defraud is an essential element of the crime the failure to aver the intent is a fatal defect.

In United States v. Bernard, 84 Fed. Rep. 636, the Court said:

> "In the third count of the indictment against Bernard and others, there is no averment of any intent *to convert the moneys to defendants' own use.* It can only stand, therefore, upon the procuring of money by false representation; and in such a count it is necessary that the particular false statement should be pointed out. In this respect the third count in that indictment is, in my judgment, defective."

It seems to be very clear that the offense under this section is not complete without intended gain to the accused.

In United States v. Beach, 71 Fed. Rep. 161, the Court said:

> " There is, therefore, in the offense defined in the statute the element of loss to the person deceived, and also the element of gain to the offender * * * . We have discovered that the schemes and artifices named in the act are of the kind which are gainful to the wrongdoer, and thereupon we must declare that no scheme or artifice which lacks this intent can be within the prohibition of the act."

These points were urged on the motion in arrest and were overruled. If tenable they go to the very substance of the indictment and render that pleading fatally defective.

Respectfully submitted,

FRANK MCGOWAN,

BERT SCHLESINGER,

Attorneys for Plaintiff in Error.